Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 95-116
Telephone Number Portability	)	RM 8385
Cost Classification Proceeding	)	

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115, U S WEST Communications, Inc. ("US WEST") respectfully submits this Reply to AT&T Corp.'s ("AT&T") Opposition[1/] to the four Applications for Review (the "Applications")[2/] of the Common Carrier Bureau's Memorandum Opinion and Order (the "Bureau Order") in docket DA 98-2534 (released Dec. 14, 1998). AT&T, the only party to oppose the Applications, argues that the Commission should affirm the Bureau Order as a correct interpretation of the LNP cost recovery instructions set forth in the Commission's Third Report and Order (the "Third Report and Order"), 13 FCC Rcd 11701 (1998). AT&T's argument is without merit. The Bureau's cost recovery rules cannot be squared with the Commission's explicit instructions or the Act, and the Commission should promptly vacate the Bureau Order as requested in the Applications.

1/ AT&T Corp. Opposition to Applications for Review, CC Dkt. No. 95-116 (filed Jan. 28, 1999).

2/ Application for Review of U S WEST Communications, Inc., CC Dkt. No. 95-116 (filed Jan. 13, 1999); Application for Review of Bell Atlantic, CC Dkt. No. 95-116 (filed Jan. 13, 1999); Application for Review of Cincinnati Bell Telephone Company ("CBT"), CC Dkt. No. 95-116 (filed Jan. 13, 1999); Petition for Clarification or Review of Ameritech, CC Dkt. No. 95-116 (filed Jan. 13, 1999).

I. THE BUREAU UNLAWFULLY DISREGARDED THE THIRD REPORT AND ORDER.

The Bureau's cost-recovery rules nullify the key test articulated by the Third Report and Order by limiting incumbent LECs to recovering only the portion of hardware and software costs incurred specifically to engineer LNP functionality.[3/] That approach directly contradicts the Commission's explicit instruction that LECs be permitted to use the LNP surcharge to recover all network and system expenditures "demonstrably . . . incremental" to the LNP mandate.[4/] Rather than provide for recovery of all such costs, the Bureau Order precludes recovery of a substantial subset of those costs.

AT&T's contention that the Bureau Order's cost shift is consistent with the Third Report and Order cannot withstand serious scrutiny. AT&T asserts that the Commission foreclosed a "but for" LNP cost recovery scheme by holding that "costs directly related to providing number portability are limited to costs carriers incur specifically in the provision of number portability services," and by defining "costs directly related to the provision of number-portability [as] that portion of a carrier's joint costs . . . incur[red] in the provision of long-term number portability."[5/] Like the Bureau, AT&T seizes on the phrase "in" or "for" "the provision of" LNP to insist that the Commission intended in the Third Report and Order to limit LEC recovery only to those expenses incurred exclusively to design LNP functionality. Thus, AT&T suggests the Bureau rightly excluded other costs incurred specifically as a necessary consequence of "providing" such LNP.

3/ Bureau Order ¶¶ 23-24.

4/ Third Report and Order ¶ 73.

5/ *Id.* ¶¶ 72, 73 (emphasis added).

AT&T's argument fails to account for the Commission's explicit decision to permit LECs to recover all costs that would not have been incurred but for compliance with the LNP mandate. Indeed, the Commission proposed, considered, and then rejected the narrow surcharge recovery rules championed by both the Bureau and AT&T. In its July 1996 FNPRM,[6] the Commission initially concluded that LNP costs did not include "the costs of network upgrades necessary to implement a database method," because such costs were "not directly related to number portability."[7] Thus, the Commission proposed that carriers recoup such network costs (including, for example, OSS) as "[general] network upgrades" rather than through the LNP surcharge.[8] However, in the Third Report and Order, the Commission reversed course in unmistakable terms and ruled that all costs incurred by LECs as a result of the LNP mandate should be recovered through the surcharge.

The Third Report and Order "recogniz[ed] that providing number portability will cause some carriers . . . to incur costs that they would not ordinarily have incurred in providing telecommunications service."[9] In particular, the Commission abandoned its earlier position and acknowledged that carriers' "costs of establishing number portability" will include substantial "costs associated with . . . the initial physical upgrading of the public switched telephone network."[10] The Commission therefore declared in its final order that it would "consider as

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6/ First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) ("FNPRM").

7/ *Id.* ¶ 208.

8/ *See id.* ¶¶ 226-28.

9/ Third Report and Order ¶ 73.

10/ *Id.* ¶ 38; *see also id.* ¶ 8.

carrier-specific costs directly related to the provision of number portability that portion of a carrier's joint costs that is demonstrably an incremental cost carriers incur in the provision of long-term number portability."[11/] The Commission specifically included network upgrade costs in this category. Only when the upgrade also yields some incidental non-LNP benefits are "some portion of such upgrade costs" to be excluded to reflect these non-LNP benefits.[12/] This express allowance of costs cannot be squared with the Bureau's (and AT&T's) suggestion that the Third Report and Order somehow obliquely intended to exclude all such costs by limiting recovery to costs incurred "in the provision" of LNP.

II. THE BUREAU ORDER IMPLICATES THE TAKINGS CLAUSE.

AT&T denies that the Bureau Order requires LECs to recover through access charges or state mechanisms LNP-caused costs that are not recoverable through the federal surcharge. Indeed, AT&T asserts that the Bureau Order does not authorize LECs to recoup such costs "from any source."[13/] If AT&T is correct, and the Bureau has simply left the LECs to absorb a broad category of LNP costs, it is difficult to understand how AT&T can simultaneously contend that the Bureau Order does not constitute a taking.[14/] Under the Takings Clause, LECs are entitled to recover their reasonable investment expenses and to realize a fair return on their capital dedicated to the public service.[15/] The Supreme Court has long held that the best assurance that regulated rates will not, in their "total effect," be confiscatory is to make sure that

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11/ *Id.* ¶ 73.

12/ *See id.*

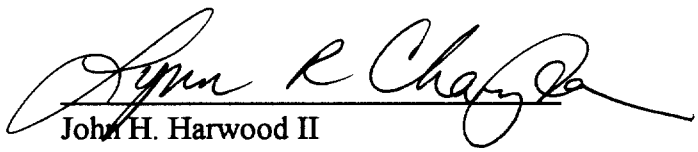
13/ AT&T Opposition at 7 (emphasis in original).

14/ *Id.* at 8.

15/ *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989).

every order, within its four corners, allows sufficient rates to cover the costs of the obligations it imposes.[16/] Whether the Bureau has ignored this principle by disregarding the recovery of substantial LNP-caused costs (as AT&T suggests), or relegated these costs to recovery mechanisms foreclosed by the Commission, the Bureau Order raises serious Fifth Amendment concerns.[17/]

Respectfully submitted,



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16/ *See, e.g., FPC v. Hope Natural Gas*, 320 U.S. 591, 605 (1944) (no need to examine the methodology of a rate order when its "total effect" provides a constitutionally sufficient rate of return).

17/ AT&T misses the point when it complains that U S WEST has not documented its takings claim. *See* AT&T Opposition at 8. U S WEST has demonstrated that the Bureau Order raises a serious constitutional question and that the 1996 Act should be construed to defeat that order — particularly in light of the conflict between the Bureau Order and the Commission's instructions. *See, e.g., Bell Atlantic v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("[w]ithin bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 1999, I caused a true copy of the foregoing Reply to Opposition to Application for Review of U S WEST Communications, Inc. to be served by hand delivery upon the persons listed on the attached service list marked with an asterisk, and by first-class mail upon all other persons listed.

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